IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 11, 2004

STATE OF TENNESSEE v. LAMONT E. HAYES

Direct Appeal from the Circuit Court for Williamson County
No. I-802-275-A Russ Heldman, Judge

No. M2003-01825-CCA-R3-CD - Filed September 23, 2004

Defendant, Lamont E. Hayes, was indicted on twenty counts of forgery, attempted forgery, theft over $1,000, theft over $500, and fraudulent use of a credit card. Following a jury trial, Defendant was convicted of the following offenses: Count 1, theft of property over $1,000, a Class D felony; Count 2, fraudulent use of a credit card, a Class A misdemeanor; Counts 3, 7, 8, and 16, forgery, a Class E felony; Counts 4, 5, 10, 13, 14, 17, and 18, the lesser included offense of facilitation of a forgery, a Class A misdemeanor; and Count 12, theft of property under $500, a Class A misdemeanor. The jury found Defendant not guilty of Count 19, attempted forgery, a Class A misdemeanor. The State requested, and was granted, a *nolle prosequi* as to Counts 6, 9, 11, 15, and 20. Following a sentencing hearing the trial court sentenced Defendant as a Range I, standard offender, to four years for Count 1, theft of property over $1,000, and two years for each forgery conviction in Counts 3, 7, 8, and 16. The trial court sentenced Defendant to eleven months twenty-nine days for each misdemeanor conviction. The trial court ordered the felony sentences to be served consecutively, and the misdemeanor sentences to be served concurrently with each other and consecutively to the felony sentences, for an effective sentence of twelve years, eleven months, and twenty-nine days. On appeal, Defendant argues that the evidence is insufficient to support his convictions and that the trial court erred in determining the length of Defendant's sentence and imposing consecutive sentencing. Based on a review of the record, we conclude that the trial court improperly applied enhancement factor (5) in determining the length of Defendant's sentences. Based upon our *de novo* review, we modify the trial court's judgment to reduce Defendant's sentence for theft of property over $1,000 by one year to a sentence of three years. The trial court's judgment is affirmed in all other respects.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Williamson County Circuit Court Affirmed in Part, Modified in Part

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

John H. Henderson, District Public Defender; and Douglas P. Nanney, Assistant District Public Defender, for the appellant, Lamont E. Hayes.

Paul G. Summers, Attorney General and Reporter; Richard H. Dunavant, Assistant Attorney General; Ronald L. Davis, District Attorney General; Mary Katharine White, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Brigitta Smead went to the Harris Teeter grocery store in Brentwood on June 3, 2002, around 11:00 a.m. When she checked out at approximately 12:30 p.m., Ms. Smead noticed that her wallet was missing. The wallet contained over $1,100 in cash and credit cards issued by MasterCard, Visa, AT & T, Discover, Hecht's, Dillard's, and J. C. Penney. Ms. Smead reported the incident to the Brentwood Police Department. Ms. Smead said that a credit card company notified her that day that there had been unusual activity with her credit card. Ms. Smead said that her next Visa statement reflected several transactions she did not make. Ms. Smead said that she did not sign the receipts dated June 3, 2002 reflecting purchases with her credit cards, nor did she give permission for anyone to use her credit cards or sign her name on purchases made with the credit cards. Ms. Smead did not know who took her wallet and could not identify Defendant at trial as the perpetrator of the offense. Ms. Smead said that her wallet was never found.

Beverly Sudberry said that she went to the H.G. Hills grocery store in Brentwood on June 5, 2002 between 1:30 p.m. and 2:00 p.m. She discovered that her billfold was missing shortly before 3:00 p.m. when she returned home. The billfold contained a small pocket book, $10 in cash, and credit cards issued by MasterCard, Dillard's and Hecht's. That same day, Ms. Sudberry said that the Texaco station in Brentwood called her husband to tell him that Ms. Sudberry's MasterCard had been used at the gas station. The receipt for this transaction was issued at 2:50 p.m. in the amount of $6.48. Ms. Sudberry said that she did not give anyone permission to use her credit cards or sign her name on purchases made with her credit cards. Ms. Sudberry did not see who stole her billfold.

Houston Little, III, an attendant at the Little's Brothers Amoco gas station in Brentwood, said that Defendant entered the gas station's store on June 5, 2002, wearing women's clothing. He purchased three cartons of cigarettes with a credit card. Mr. Little identified this purchase transaction on the sales receipt issued at 12:55 p.m. on June 5, 2002, in the amount of $109.21 showing Ms. Sudberry's credit card number. Mr. Little identified Defendant from the store's surveillance film as the person who signed the sales receipt for the cigarettes with Ms. Sudberry's credit card number. Mr. Little said that Defendant was accompanied by a woman.

Katrina Amador was working at the Exxon gas station in Brentwood on June 3, 2002. She saw a woman and another person who was either a man or a woman leave the store and walk toward a car at the pump where gasoline was purchased with Ms. Smead's Visa credit card at 11:59 p.m. Ms. Amador said that she did not know which of the two people actually used the credit card or paid for the items purchased inside the store. Ms. Amador identified Defendant as the individual who was with the woman that day.

David Prather was working as a security guard at Dillard's on June 5, 2002. That afternoon, Mr. Prather said that he observed two people on the security camera who appeared to be acting suspiciously because they were looking around to see who was watching them. Mr. Prather recognized Defendant as one of the pair because he had previously encountered him. Mr. Prather said that Defendant went to a sales counter around 3:30 p.m.

Joey Young, a Dillard's security employee working in loss prevention, testified that Defendant and two women were filmed with the store's security camera on June 3, 2002. At 12:10, the surveillance tape showed two women, one in a white hat, passing through the men's cologne department. At 12:13 p.m., the surveillance tape showed the two women in the men's clothing department, with one of them standing at the sales counter. A sales receipt for the purchase of jeans and shorts was generated from this department at 12:13 p.m. with Ms. Smead's Discover credit card. Ms. Smead's Discover credit card was also used to purchase men's shoes at 12:27 p.m. and glassware at 12:37 p.m. At 12:38 p.m., the surveillance tape captured the two women standing at a display counter, each carrying several bags. At 12:40 p.m., one of the women passed through the men's cologne department. About 12:40 p.m., Defendant appeared on the surveillance tape as he walked through the women's department. At 12:41 p.m., he was standing in front of the sales counter in that department. A sales receipt using Ms. Smead's Visa credit card number was generated at 12:42 p.m. for the purchase of women's clothing.

On June 3, 2002, two sales receipts from Sears at Cool Springs Mall were generated at 12:25 p.m. and 12:35 p.m. respectively using Ms. Smead's Visa credit card.

Mr. Young said that although he had not personally observed Defendant shopping on June 3, he manually followed Defendant and his female companion with the surveillance camera on June 5, 2000 because the pair were moving through the various store departments at a fast pace. At 3:45 p.m., Defendant and Demetra Hamilton, Defendant's niece, were standing at a sales counter. A Dillard's sales receipt was generated at 3:45 p.m. using Ms. Sudberry's Dillard's credit card. At 3:51, Defendant and Ms. Hamilton were filmed in the infant's department as Ms. Hamilton walked to the sales counter. A sales receipt from this department was generated at 3:52 p.m. with Ms. Sudberry's Dillard's credit card, but the transaction was not approved.

The State also introduced two other sales receipts from Dillard's using Ms. Sudberry's Dillard's credit card on June 5, 2002. The first sales receipt was generated at 3:24 p.m. and the second at 3:36 p.m. Mr. Young said that Defendant was carrying a shopping bag on June 5, 2002, but he did not know how many items were in the bag.

Demetra Hamilton, Defendant's niece, testified that Defendant telephoned her on June 5, 2002 and asked her to pick him up. After Defendant got in the car, the two of them drove to a Texaco gas station. Ms. Hamilton said that Defendant gave her Ms. Sudberry's MasterCard which she used to purchase gasoline. Ms. Hamilton said that she signed the sales receipt for this purchase. Ms. Hamilton said that she and her uncle then drove to Cool Springs Mall, and Defendant asked Ms. Hamilton if she wanted to go shopping. Defendant gave her Ms. Sudberry's Dillard's credit card as

they entered the mall which she used to purchase some clothing. Ms. Hamilton said that she used the credit card three times and signed the applicable sales receipts. Ms. Hamilton said that she did not give Defendant any of the merchandise she purchased. Ms. Hamilton initially denied that she had attempted to purchase baby clothes with the Dillard's credit card, but later admitted that the transaction for this purchase had not been approved. Ms. Hamilton said that she was helping Defendant select a gift for a baby shower. Ms. Hamilton said she was not with Defendant on June 3, 2002, but identified Defendant's companions from the surveillance tapes as Yolanda Hamilton, her sister, and Travania Hamilton, her aunt. Demetra Hamilton denied that her sister, rather than Defendant, gave her the credit cards.

Adrian Breedlove, a detective with the Brentwood Police Department, showed Joey Young photographs of the surveillance tapes from the Texaco station where Ms. Sudberry's credit card had been used. Detective Breedlove said that Mr. Young identified Defendant as the same person shown in the Dillard's surveillance tapes. Detective Breedlove admitted that he did not know who stole Ms. Sudberry's and Ms. Smead's wallets. He also said that none of the merchandise purchased with the two victims' credit cards had been recovered.

I. Sufficiency of the Evidence

Defendant argues in general that the evidence was insufficient to support his convictions. Specifically, Defendant points out that the surveillance tapes show Ms. Hamilton as the one who made the purchases on June 5, 2002, with the stolen credit card, and Ms. Hamilton admitted that she made three of the transactions. Defendant argues that his conviction for forgery in Count 3 was not supported by the evidence because the surveillance tape was not clear enough to identify Defendant.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the State in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

Relying on *State v. Binette*, 33 S.W.3d 215 (Tenn. 2000), Defendant urges this Court to review the Dillard's surveillance tapes from June 3, 2002 and June 5, 2002 *de novo* without a presumption of correctness. *Binette* involved the standard of review applicable to a trial court's findings of fact in a hearing on a motion to suppress when the only evidence offered on behalf of the

state was a videotape of the defendant's alleged driving errors. Our supreme court stated that "when a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, a reviewing court must examine the record *de novo* without a presumption of correctness." 33 S.W.3d at 217. Under the facts presented in *Binette*, the court observed that it was in just as good a position as the trial court to review the evidence. *Id*.

Binette is clearly distinguishable from the facts presented in the case *sub judice*, and the holding in *Binette* was specifically limited to its facts. *Id.* at 217 n. 1. In this instance, the jury was invested with the role of fact finder. To review the surveillance tapes *de novo* as Defendant suggests would impermissibly substitute this Court's inferences for those drawn by the jury from the evidence. *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Unlike the situation present in *Binette*, credibility was directly at issue in the case *sub judice*. As well as the surveillance videotapes, the State presented Joey Young's and Demetra Hamilton's testimony to detail Defendant's actions on the days in question. The jury by its verdict obviously resolved any conflicts and drew any inferences from the evidence in favor of the State. As noted above, our review is limited to determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

A. Theft

Defendant was found guilty of two counts of theft. Defendant argues that there is no evidence that he was the one who stole the victims' wallets while they were shopping. A person may commit theft, however, if he or she exercises control over another's property without that person's consent. Tenn. Code Ann. § 39-14-103 (2003); *State v. Byrd*, 968 S.W.2d 290, 292 (Tenn. 1998).

Ms. Smead testified that her wallet was in her pocketbook when she arrived at Harris Teeter at approximately 11:00 a.m. on June 3, 2002. At some point between 11:00 a.m. and 12:40 p.m. when she checked out, her wallet was stolen. Ms. Smead's Visa credit card was used to purchase gasoline at an Exxon station at 11:59 p.m. Ms. Amador identified Defendant as one of the individuals who was in the car at the pump where the gas was purchased. Defendant was captured on a surveillance tape at 12:41 in the women's department at Dillard's immediately prior to the time a receipt reflecting Ms. Smead's Visa credit card account number was issued for the purchase of women's clothing.

Ms. Sudberry testified that she had her billfold containing her credit cards with her when she arrived at the H. G. Hill's in Brentwood on June 5, 2002, between 1:30 p.m and 2:00 p.m. She discovered that her billfold was gone when she arrived home shortly before 3:00 p.m. Ms. Hamilton testified that she accompanied Defendant to a Texaco gas station where he gave her Ms. Sudberry's MasterCard to purchase gas at 2:50 p.m. Ms. Hamilton said that she then drove to Little's Brothers Amoco gas station where Defendant purchased cigarettes at 2:55 p.m. Mr. Little identified Defendant as the person who purchased the cigarettes with Ms. Sudberry's credit card. Evidence that the victims' credit cards were used shortly after their billfolds were stolen is strong circumstantial evidence that Defendant was guilty of theft of the billfolds and all of their contents. Viewing the

evidence in the light most favorable to the state, there is sufficient evidence to support the jury's finding beyond a reasonable doubt that Defendant exercised control over Ms. Smead's credit cards on June 3, 2002, and Ms. Sudberry's credit cards on June 5, 2002, and also exercised control over each victim's billfold and the contents thereof.

B. Forgery

Defendant was convicted of four counts of forgery. As relevant here, one commits forgery if he or she makes, alters, completes, executes or authenticates "any writing so that it purports to be the act of another who did not authorize that act." Tenn. Code Ann. § 39-14-114 (2003). Defendant's forgery conviction in Count 3 was based upon his purchase of women's clothing in Dillard's with Ms. Smead's Visa credit card. Mr. Young identified Defendant as the individual in the surveillance tape on June 3, 2002, shopping in the women's department at Dillard's. The surveillance tape showed Defendant walking through the women's department around 12:40 p.m. At 12:41 p.m., he was at the cash register, and at 12:42 p.m., a sales receipt for the purchase of women's clothing was generated with Ms. Smead's credit card and with a signature purporting to be that of Ms. Smead's. The evidence is sufficient to support Defendant's conviction of forgery in Count 3.

Defendant's forgery convictions in Count 7 and Count 8 were based upon purchases at Sears on June 3, 2002 with Ms. Smead's Visa credit card. Each sales receipt shows Ms. Smead's Visa credit card number and a signature purporting to be hers. Ms. Smead said that her Visa credit card was stolen along with her other credit cards on June 3, 2002. The sales transactions occurred at 12:25 p.m. and 12:35 p.m. Defendant's companions are shown shopping in the Dillard's store on that day between 12:13 p.m. and 12:40 p.m when certain purchases were made with Ms. Smead's Discover card. Defendant does not appear in the Dillard's surveillance tapes until about 12:40 p.m. A rational jury could conclude from the evidence beyond a reasonable doubt that Defendant was the one using and exercising control over Ms. Smead's Visa credit card at Sears' department store.

Defendant's conviction for forgery in Count 16 was based on the purchase of cigarettes with Ms. Sudberry's credit card at the Little's Brothers Amoco gas station on June 5, 2002. The sales receipt shows a signature purporting to be that of Ms. Sudberry's. Mr. Little testified that Defendant was the one who purchased the cigarettes with Ms. Sudberry's credit card and signed the receipt. The evidence is sufficient to support Defendant's conviction of forgery in Count 16.

C. Facilitation of Forgery

Defendant was indicted on seven counts of forgery in Counts 4, 5, 10, 13, 14, 17, and 18. The jury found Defendant not guilty of forgery and guilty of the lesser included offense of facilitation of forgery in each of these counts. A person is criminally responsible for the facilitation of a felony if he or she, "knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of a felony." Tenn. Code Ann. § 39-11-403 (2003).

Defendant's convictions for facilitation of forgery in Counts 13, 14, 17, and 18 arise out of Ms. Hamilton's purchases and attempted purchase in Dillard's with Ms. Sudberry's Dillard's credit card on June 5, 2002. Ms. Hamilton said that Defendant asked her if she wanted to go shopping when she picked him up and gave her Ms. Sudberry's credit card as they entered the mall. Ms. Hamilton said that she used the car to buy various items at Dillard's and that she attempted to buy baby clothes, but the transaction was not approved. On the June 5, 2002 Dillard's surveillance tapes, Defendant and Ms. Hamilton are seen shopping together at the time the purchases were made. Viewing the evidence in the light most favorable to the State, the evidence is sufficient to support Defendant's convictions for facilitation of forgery in Counts 13, 14, 17, and 18.

Counts 4, 5 and 10 were based upon the purchase of men's denim shorts and Tommy jeans, men's athletic shoes, and glassware in the Dillard's store with Ms. Smead's Discover credit card on June 3, 2002. The three sales receipts recording these purchases were generated at 12:13 p.m., 12:27 p.m., and 12:37 p.m. During this time frame, the Dillard's surveillance camera filmed two women shopping in the departments correlating to the items purchased. On cross-examination, Ms. Demetra Hamilton identified the two women as her sister, Yolanda Hamilton, and her aunt, Travania Hayes. Ms. Demetra Hamilton said that she could not go shopping with Defendant that day because June 3 was her child's birthday. Ms. Amador testified that Defendant was with a woman when Ms. Smead's credit card was used to purchase gasoline at the Exxon station on June 3, 2002. Defendant was filmed in Dillard's using Ms. Smead's Visa credit card shortly after Ms. Yolanda Hamilton and Ms. Hayes made their purchases with Ms. Smead's Discover credit card. Although not overwhelming, when viewed in a light most favorable to the State, the evidence is sufficient to support Defendant's convictions for facilitation of forgery in counts 13, 14, 17, and 18. Defendant is not entitled to relief on this issue.

II. Sentencing Issues

Defendant testified at the sentencing hearing. He maintained that he did not steal Ms. Smead's credit cards. Defendant said that he found Ms. Sudberry's wallet at the gas station and admitted that he and Ms. Hamilton used Ms. Sudberry's credit cards. Defendant, however, said that Ms. Hamilton made all of the purchases because Defendant did not think he could pass for a female as indicated by the name on the credit card. Defendant conceded, however, that he received some of the merchandise purchased with Ms. Sudberry's credit cards. Defendant said that he proceeded to trial rather than enter into plea negotiations because he knew he was innocent of the charges against him pertaining to the theft of Ms. Smead's wallet. Defendant apologized for taking Ms. Sudberry's credit cards.

Defendant said that he was diagnosed with AIDS eleven years ago and was on medication for the disease. Defendant said that he had exaggerated when he told David Pratt, the probation officer who prepared his pre-sentencing report, that he had been arrested for prostitution over one hundred times. Defendant said that he just said the first number that came to mind in response to Mr. Pratt's question, and he had actually only been arrested between eighteen and twenty times for prostitution. Defendant explained that he lived one block off Dickerson Road and was often issued

a citation when he was just walking down the street. Defendant said that only about thirty percent of his arrests for prostitution involved sex for money transactions. Defendant admitted that he had been convicted of thirty-four misdemeanor charges since 1985, including convictions for prostitution, theft, criminal trespass, fraudulent use of a credit card, unlawful possession of drug paraphernalia, and carrying a concealed weapon. Defendant said that he had been placed on probation several times and successfully completed each probation.

On cross-examination, Defendant admitted that he had previously violated the terms of his bond in 1994 when he failed to report to his probation officer. Defendant admitted that he had used cocaine since he was fifteen years old, and that he told Mr. Pratt that the usual amount of cocaine he ingested was one gram of cocaine per day. Defendant explained, however, that he only meant that he would usually use one gram of cocaine in a twenty-four hour period, not that he used cocaine every day. Defendant said that he used cocaine about once a week. He last used cocaine about two days before his arrest on the current charges. Defendant said that his friends supplied him with cocaine, but then later said that he had enough spending money to support his habit since he did not use cocaine every day.

Defendant said that he did not make any significant money from prostitution. Defendant said that he usually engaged in prostitution on Saturday nights and made between $20.00 and $100.00 for each act. Defendant said that his last act of prostitution was five years ago. Defendant said that he had engaged in prostitution five or ten times since he was diagnosed as HIV positive but did not believe that he had infected anyone with the disease.

Tamara Hamilton, Defendant's niece, and Kenneth Hayes, Defendant's brother, each expressed their wish that Defendant receive a lenient sentence.

Based upon the evidence presented at trial and at the sentencing hearing, as well as the principles of sentencing, the trial court applied the following enhancement factors in determining the length of Defendant's sentence: factor (2), Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, to all convictions; factor (3), Defendant was a leader in the commission of an offense involving two or more criminal actors, as to the facilitation of forgery convictions pertaining to June 5, 2002; and factor (5), the victim was particularly vulnerable because of age to all convictions. Tenn. Code Ann. §§ 40-35-114(2), (3) and (5) (2003). The trial court found as a mitigation factor that Defendant's conduct neither caused nor threatened serious bodily injury, but accorded very little weight to this factor *Id.* § 40-35-113(1). The trial court specifically found Defendant not credible at the sentencing hearing. The trial court gave the three enhancement factors significant weight and sentenced Defendant to four years for the theft of property over $1,000 conviction, two years for each of the other felony convictions, and eleven months, twenty-nine days for each of the misdemeanor convictions.

In considering whether to impose consecutive sentencing, the trial court found that the preponderance of the evidence established that Defendant was a professional criminal who

knowingly devoted his life to criminal acts as a major source of income, and was an offender with an extensive record of criminal activity. Tenn. Code Ann. §§ 40-35-115 (b)(1) and (2). The trial court ordered that Defendant's felony convictions run consecutively. The trial court ordered Defendant's misdemeanor sentences to run concurrently with each other but consecutively to the felony sentences, for an effective sentence of twelve years, eleven months and twenty-nine days.

Although Defendant was eligible for alternative sentencing, the trial court found that a sentence of confinement was particularly appropriate in order to provide a general deterrent to others. *Id.* § 40-35-102(3)(A). The trial court also found that a sentence of confinement was necessary to protect society from a defendant with a lengthy criminal history, to avoid depreciating the seriousness of the offense, and because measures less restrictive that confinement have frequently been applied unsuccessfully. *Id.* § 40-35-103(1)(A), (B), and (C).

Defendant argues (1) that the evidence does not support the application of enhancement factors (3) and (5); (2) that the trial court erred in finding him to be a professional criminal; (3) that the trial court erred in according the mitigating factor little weight; and (4) that the trial court erred in ordering Defendant's misdemeanor sentences to run consecutively to his felony sentences. Defendant also argues that the trial court misapplied enhancement factor (4), but the record does not show that the trial court considered this enhancement factor in determining the length of Defendant's sentence. Defendant does not appeal the trial court's application of enhancement factor (2), that Defendant has a previous history of criminal convictions or behavior, or the trial court's denial of alternative sentencing.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. Tenn. Code Ann. §§ 40-35-103 and -210 (2003); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). If the trial court has imposed a lawful sentence by following the statutory sentencing procedure, given due consideration and proper weight to the factors and sentencing principles, and made findings of fact adequately supported by the record, this Court may not modify the sentence even if it would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing that his sentence is

improper. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

The weight placed on one factor by the trial court may vary from that assigned to another, and the legislature has specifically declined to assign a numerical value to mitigating and enhancement factors. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments (2003); *State v. Spratt*, 31 S.W.3d 587, 606 (Tenn. 2000). The weight accorded enhancement and mitigating factors is within the trial court's discretion so long as the record supports its findings and the findings comply with sentencing principles. *State v. Kelly*, 34 S.W.3d 471, 479 (Tenn. Crim. App. 2000).

Defendant was convicted of theft of property over $1,000, a Class D felony, and forgery, a Class E felony. As a Range I, standard offender, the sentencing range for a Class D felony is not less than two years nor more than four years, and for a Class E felony not less than one year nor more than two years. Tenn. Code Ann. §§ 40-35-112(a)(4) and (5) (2003). The presumptive sentence for a Class D and a Class E felony is the minimum sentence in the range if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c). Should there be enhancement but no mitigating factors, the trial court may set the sentence above the minimum but still within the range. *Id.* § 40-35-210(d) (2003). If both enhancing and mitigating factors are present, the trial court must start at the minimum sentence of the range, enhance the sentence within the range as appropriate for the enhancing factors, and then reduce the sentence as appropriate for the mitigating factors. *Id*. § 40-35-210(e) (2003).

Defendant was also convicted of fraudulent use of a credit card and facilitation of forgery, which are Class A misdemeanors. The sentence for a Class A misdemeanor cannot exceed eleven months, twenty-nine days. Defendant, however, is not entitled to a presumption of a minimum misdemeanor sentence. *State v. Humphreys*, 70 S.W.3d 752, 770 (Tenn. Crim. App. 2001) (citing *State v. Seaton*, 914 S.W.2d 129, 133 (Tenn. Crim. App. 1995)).

Because we find that the trial court misapplied enhancement factor (5) and erroneously considered Defendant as a professional criminal in determining whether to impose consecutive sentencing, our review is *de novo* without a presumption of correctness.

The trial court found that Defendant was a leader in the commission of the offenses on June 5, 2002 when he was accompanied by Ms. Hamilton. Defendant testified that he gave Ms. Sudberry's credit cards to Ms. Hamilton so that she could make purchases at the gas station and at Dillard's because he was afraid the clerk would not believe that he was Ms. Sudberry when he signed the card. Ms. Tamara Hamilton testified that Ms. Demetra Hamilton, her cousin, did not have a criminal record before she committed the offenses with Defendant. The evidence does not preponderate against the trial court's finding that enhancement factor (3) is applicable to Counts 12, 13, 14, 16, 17, and 18.

We respectfully disagree, however, with the trial court's finding that enhancement factor (5), the victims were particularly vulnerable because of age, was applicable in determining the length of

each of Defendant's sentences. The age of the victims was not established at trial. We glean from the victims' statements as to the length of their marriages, however, that the two women were at least over sixty. The trial court made no findings of fact beyond the statement that the victims' age made them clearly vulnerable.

The State bears the burden of proving that the victims' age made them particularly vulnerable to the offenses. *State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993). In *Adams*, our supreme court observed that "the vulnerability enhancement relates more to the natural physical and mental limitations of the victim's age." *Id*. In other words, the State must show that the victim was "incapable of resisting, summoning help, or testifying against the perpetrator." *Id.* In addition, the enhancement of a defendant's sentence because of a victim's age must be appropriate to the offense. *State. v. Poole*, 945 S.W.2d 93, 97 (Tenn. 1997). For example, a victim's advanced age may not render him or her particularly vulnerable when the defendant steals the victim's checks from a mailbox. *State v. Seals*, 735 S.W.2d 849, 853 (Tenn. Crim. App. 1987). *See also State v. Butler*, 900 S.W.2d 305 (Tenn. Crim. App. 1994) (The victim who walked with the assistance of a cane was not particularly vulnerable because no victim, whether elderly or not, could have resisted the second degree murder offense committed in that manner).

Both Ms. Sudberry and Ms. Smead testified that they were not aware their billfolds had been stolen until some time after the fact. Neither woman noticed anyone lurking around their grocery carts, and neither was accosted in any way. Under the circumstances surrounding these thefts, anyone who left their grocery cart unattended with a billfold or wallet in view, regardless of that person's age, was a potential victim of this type of offense.

The State argues generally that "the fading senses of the elderly" necessarily makes them more vulnerable. We note first of all that there is no proof in the record that either of the victim's senses were in any way fading. To the contrary, although understandably nervous, each victim ably and confidently recalled the circumstances leading up to and following the theft of their billfolds. Furthermore, our supreme court has previously held that "unless the State produces evidence of physical or mental limitations at the time of the offense, along with proof of the victim's age, it cannot be presumed that the victim was *particularly* vulnerable based solely on her age." *Poole*, 945 S.W.2d at 98. While a victim's advanced age may make the victim "vulnerable" in a general sense, "[t]hat particular vulnerability, however, may play no part in the crime." *State v. Lewis*, 44 S.W.3d 501, 505 (Tenn. 2001). "A vulnerability that is wholly irrelevant to the crime is not 'appropriate for the offense' as required by Tennessee Code Annotated section 40-35-114." *Id.*, (citing *Butler)*, 900 S.W.2d at 111. In short, the State failed to prove the relevancy of the victims' ages to the offense. Because the State failed to carry its burden of proof, enhancement factor (5) should not have been considered by the trial court in its sentencing determinations.

Defendant argues that the trial court improperly assigned mitigating factor (1) little weight in determining the length of Defendant's sentence. Defendant contends that, by specifically enacting this mitigating factor, the legislature intended to give substantial weight to the fact that a defendant's criminal actions did not cause or threaten serious bodily injury. As noted above, however, the

legislature specifically declined to assign a weight to a particular enhancement or mitigating factor and left such determination to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments (2003). As the trial court noted at the sentencing hearing, it was the absence of harm or the threat of harm that made Defendant's offense a theft. *See State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001) ("[I]t is the use of "violence" or "fear" that elevates a theft to robbery.) The evidence does not preponderate against the trial court's finding that mitigating factor (1) is entitled to only slight weight.

In summary, although we find that the trial court misapplied enhancement factor (5) to all of Defendant's felony sentences, the record fully supports application of factor (2) to each of Defendant's sentences, and factor (3) to Defendant's sentences for his convictions of Counts 12, 13, 14, 16, 17, and 18. Considering the little weight attached to mitigating factor (1), we conclude that the trial court did not err in sentencing Defendant to two years for his felony convictions in Counts 3, 7, 8, 12, and 16, and eleven months, twenty-nine days for the misdemeanor convictions in Counts 4, 5, 10, 13, 14, 17, and 18. Because the trial court misapplied enhancement factor (5) to Defendant's theft conviction of Count 1, however, based upon our *de novo* review, we reduce this sentence by one year.

When a defendant is convicted of more than one offense, the trial court may order the sentences to run consecutively if any one of seven specifically enumerated factors is present. Tenn. Code Ann. § 40-35-115 (2003). Defendant argues that the evidence does not support the trial court's finding that he is a professional criminal who has knowingly devoted his life to criminal acts as a major source of livelihood. Defendant testified that he received disability payments in the amount of $500.00 per month and supplemented this income by odd jobs. Defendant said he received government assistance for his apartment, and TennCare and SSI paid for most of his medicine. Defendant said that he "got by" on his income. Defendant further stated that he only made between $20 to $100 for a sexual act in exchange for money, and that he usually engaged in prostitution only on Saturday night. Defendant admitted he had a drug habit but said that he was able to cover the costs of his habit either personally or through friends.

The trial court based its finding that Defendant was a professional criminal on his lengthy history of criminal activities. There was no proof, however, that the money generated from Defendant's prostitution or theft activities constituted a major source of livelihood. *See State v. Desirey*, 909 S.W.2d 20 (Tenn. Crim. App. 1995). We respectfully disagree with the trial court's conclusion that Defendant's SSI disability payments should not be considered in determining how Defendant made his livelihood. Defendant testified that he paid all of his living expenses with the money received from SSI as well as various part-time jobs and other government assistance. Although Defendant's prostitution and theft activities appear to have supplemented his income or lifestyle, the evidence does not support the trial court's finding that Defendant was a professional criminal.

Nonetheless, consecutive sentencing is appropriate in this case. Defendant does not contest the fact that he has an extensive record of criminal activity consisting of at least thirty-four convictions and numerous arrests for prostitution over the past seventeen years. Tenn. Code Ann. § 40-35-115(b)(2) (2003). It is necessary to find the presence of only one of the statutory categories listed in Tennessee Code Annotated section 40-35-115(b) to support the imposition of consecutive sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

Because the trial court improperly applied enhancement factor (5) in determining the length of Defendant's sentence for theft of property over $1,000 in Count 1, we reduce Defendant's sentence for this offense by one year to a sentence of three years. We otherwise affirm the judgments of the trial court.

_____

THOMAS T. WOODALL, JUDGE